

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

**COMMENTS OF
TDS TELECOMMUNICATIONS CORPORATION**

Gerard J. Waldron
Mary Newcomer Williams
Matthew S. DelNero
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Tel.: (202) 662-6000
Fax: (202) 662-6291

Attorneys for TDS Telecom

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INTRODUCTION AND SUMMARY

The universal service provisions of the Communications Act (Act) charge the Commission with adopting policies that effectively advance the fundamental goal of universal service: ensuring that consumers throughout the country have continued access to quality telecommunications services at just, reasonable, and affordable rates. Accomplishing that goal requires the Commission both (1) to control the size of the Universal Service Fund (USF or Fund) so that all consumers' contributions to the Fund remain reasonable and (2) to target the support paid out of the Fund to services and carriers that serve the Fund's underlying mission.

In recent years, both the number of carriers drawing support from the Fund and the overall size of the Fund have grown. Noting these developments, the Commission recognized the need to reevaluate, with the assistance of the Federal-State Joint Board on Universal Service (Joint Board), the rules and policies governing the Fund to ensure that they remain consistent with the statutory mandate.¹ It is in this context that the Commission now seeks comment on the Joint Board recommendations concerning the rules governing (1) the

¹ See Referral Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 02-307 (rel. Nov. 8, 2002).

designation of eligible telecommunications carriers (ETCs) entitled to receive support from the Fund and (2) the payment of high-cost support to these ETCs.²

TDS Telecommunications Corporation (TDS Telecom), a holding company operating 112 incumbent local exchange carrier (ILEC) subsidiaries serving primarily small and rural communities,³ commends the Commission for recognizing the need to revisit the matters at issue in the Recommended Decision. As the Commission undertakes this effort, TDS Telecom urges the Commission to adopt rules and policies that promote the goals of the Act by ensuring that (1) only carriers who are capable of and committed to providing truly universal service throughout high-cost areas receive support from the Fund and (2) the support paid to those carriers is reasonably related to their costs of providing service. The Joint Board recommendations concerning the ETC designation process provide a useful foundation on which to develop such policies, but they do not go far enough. Conversely, the Joint Board's recommendation to limit the payment of universal service support to a single connection serving each high-cost subscriber takes the Commission in the wrong direction. This "primary line" proposal would not only be administratively unworkable and confusing to consumers, it would

² See Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 04-127 (rel. June 8, 2004) (Notice) (seeking comment on Recommended Decision, *Federal-State Joint Board on Universal Service Seeks Comment on Certain of The Commission's Rules Relating to High-Cost Universal Support and The ETC Designation Process*, CC Docket No. 96-45, FCC 04J-1 (rel. Feb. 27, 2004) (Recommended Decision)).

³ TDS Telecom's ILEC subsidiaries serve over 700,000 local access lines in small and rural communities. The TDS ILECs take very seriously their commitment to provide high-quality telecommunications services at affordable rates throughout their service areas. Indeed, in respected third-party surveys subscribers have rated TDS Telecom at levels higher than customers of almost every other telephone company on all dimensions, from overall satisfaction to friendliness of employees to reliability of service. But the ability of the TDS ILECs to provide this level of service to their rural customers depends in most cases on the TDS ILECs' receiving substantial support from the Universal Service Fund. Accordingly, TDS Telecom has a strong interest in ensuring that the Fund remains viable and that its resources are used for the purposes Congress intended.

violate the Act by eroding the support necessary to maintain robust and evolving telecommunications networks serving rural, high-cost areas.

To promote truly universal service while maintaining a sustainable Universal Service Fund, TDS Telecom urges the Commission to take the following steps:

- Adopt mandatory eligibility requirements that a carrier must meet before either the federal or a state commission can designate the carrier to receive universal service support. Mandatory minimum eligibility requirements should include those recommended by the Joint Board as well as requirements to satisfy state “carrier of last resort” obligations and service quality requirements. Competitive ETCs should also be required to provide local usage with features and at rates comparable to those of the incumbent LEC;
- Provide additional guidance concerning the rigorous public interest standard that must be satisfied before a regulator can designate a CETC in a rural service area;
- Modify the basis for calculating high-cost support so that CETCs recover support that is reasonably related to their costs of providing supported services in high-cost areas.

TDS Telecom does not oppose deferring a decision to modify the basis of support paid to CETCs to the proceeding that will review the rural high-cost mechanism,⁴ provided that the proceeding progresses relatively expeditiously. However, the delay in modifying the basis of support – an essential mechanism for controlling the size of the Fund – should *not* drive the Commission to adopt the Joint Board’s unworkable, illegal and harmful “primary line” proposal. Limiting the payment of universal service funds to *carriers* that provide supported services and to *amounts* that are sufficient (but not excessive) to enable the provision of those services is entirely consistent with the statutory mandate.⁵ On the other hand, narrowing the scope of

⁴ See Referral Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 04-125 (rel. June 28, 2004).

⁵ As we will discuss in detail in the proceeding addressing the rural high-cost support mechanism, supporting CETCs in amounts tied to the incumbent wireline carrier’s embedded network costs is likely to create economically inefficient incentives for competitors to serve high-cost areas, particularly where
(continued...)

support paid to all ETCs in the manner proposed in the Recommended Decision would undermine the statutory goal of ensuring predictable support that will preserve and promote the provision of an evolving level of telecommunications and information services throughout the U.S.

I. THE ETC DESIGNATION PROCESS SHOULD ENSURE THAT ONLY CARRIERS CAPABLE OF AND COMMITTED TO PROVIDING TRULY UNIVERSAL SERVICE RECEIVE SUPPORT FROM THE FUND

As Commissioner Martin recognized in the Recommended Decision, the goal of the universal service program is not to create or promote competition in rural, high-cost service areas.⁶ Rather, the goal is to ensure that consumers across the nation have access to an evolving level of telecommunications services at reasonable, affordable rates.⁷ In areas where costs are so high that they cannot be recovered fully from subscribers at reasonable rates, an additional cost recovery mechanism – universal service funding – is necessary to accomplish the statutory goal. Of course, providing this type of external support to multiple service providers will in most cases be economically inefficient. Accordingly, as stewards of the universal service fund derived from contributions paid by all consumers, state and federal regulators should apply strict guidelines

(continued...)

the CETC's network and price structure are entirely different from the ILEC's. Supporting multiple rural networks in this fashion will quickly result in unsustainable burdens on the Fund.

⁶ Recommended Decision, Separate Statement of Commissioner Kevin Martin, Dissenting in Part and Concurring in Part, at 1 (Martin Statement).

⁷ Some wireless carriers petitioning for ETC status in rural areas have argued that consumers in rural areas should have access to a range of competitive service providers that is comparable to that available in urban areas. But this is not what the Act requires or expects. Instead, the Act mandates a comparable *level of service* rather than comparable competitive alternatives across markets. In many high-cost areas, comparable service can best be achieved by providing support to a single carrier. In addition, comparable wireless services are increasingly available in rural markets without the need for universal service funding. This may be due to the different costs of deploying wireless networks or because the nature of wireless services (which can derive additional revenues in lightly-populated areas from mobile travelers passing through those areas) allows wireless carriers to recover the costs of serving high-cost areas without external support.

before making universal service support available to more than one carrier in such high-cost markets. These guidelines should require regulators to give careful consideration to whether the benefits afforded by designating the additional ETC will truly advance the goal of promoting universal service to consumers throughout the affected service area. Meaningfully limiting ETC designation to carriers providing truly universal service throughout their designated service areas – as opposed to providing a windfall to carriers offering a largely complementary service often in more heavily-populated or well-traveled areas – is both consistent with the Act and essential to prevent excessive growth of the Fund.

The Recommended Decision correctly recognizes the need for the Commission to provide additional guidance concerning the minimum eligibility requirements that must be satisfied before a carrier can be found to have satisfied the statutory standard for ETC designation.⁸ The Recommended Decision also proposes some useful baseline eligibility requirements. But the recommendations fall short in two important respects. First, because the Joint Board recommends only permissive guidelines, there is no guarantee that the proposal will adequately curtail the designation of unqualified carriers as ETCs. Second, the minimum eligibility requirements recommended by the Joint Board do not include important requirements essential to ensuring that carriers drawing from the Fund in fact provide the type of universal, evolving telecommunications service that Congress sought to promote.

⁸ See 47 U.S.C. § 214(e)(1).

A. Carriers Seeking ETC Designation Should Be Required To Satisfy Mandatory Minimum Eligibility Requirements

The Recommended Decision proposes that the Commission adopt “permissive federal guidelines” to be applied by state commissions evaluating petitions for ETC designation.⁹ These guidelines “should encourage state commissions to conduct rigorous reviews of ETC applications” and “could improve consistency in the treatment of requests for ETC status.”¹⁰ But there are signs that some state commissions need more than just “encouragement” to apply rigorous standards for ETC designation. Some states seem to view the Universal Service Fund as a source of additional federal funding that should be maximized whenever possible. These states designate additional CETCs almost as a matter of course, in most cases citing the public interest benefit of promoting competition in rural areas. This approach departs from the statutory principles governing the universal service program by undermining predictability in universal service support (because it creates strong disparities between “permissive” states and states applying appropriately rigorous standards to petitions for ETC designation) and by threatening to dilute universal service funds among an economically inefficient number of carriers.

To ensure that the ETC application and designation process is rigorous in all states, as the Joint Board agrees it should be,¹¹ the Commission should establish *mandatory* minimum eligibility requirements that state commissions must find are satisfied before they can designate a competitive ETC to receive universal service support. States would, of course, be free to adopt additional requirements that go beyond those mandatory minimum requirements adopted by the Commission.

⁹ See Recommended Decision ¶ 9.

¹⁰ Recommended Decision ¶¶ 11, 13.

¹¹ Recommended Decision ¶ 9.

The Commission has the authority to impose mandatory guidelines for determining the eligibility of carriers for ETC designation, which state commissions would then have flexibility in interpreting and applying to local circumstances. The Universal Service Fund is a federally-administered creation of the Act, and Section 201(b) of the Act “*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies,” even where those rules might affect the exercise of state regulatory jurisdiction under the Act.¹² Thus, just as the Commission had the authority to promulgate the rules and methodology to be applied by state commissions arbitrating local interconnection agreements,¹³ the Commission can prescribe the guidelines to be applied by state commissions evaluating applications for ETC designation under Section 214(e)(2) of the Act.

In addition, federal mandatory *minimum* requirements for ETC designation are readily distinguishable from the rules struck down by the Fifth Circuit Court of Appeals in *Texas Office of Public Utility Counsel v. FCC*.¹⁴ There, the Commission had interpreted the Act to prohibit states from imposing service quality standards in making competitive ETC determinations.¹⁵ The Court rejected the Commission’s interpretation, holding that the Commission could not bar states from imposing *additional* requirements beyond those listed in Section 214(e)(1) of the Act.¹⁶ *Texas Public Utility Counsel* did not, however, limit the Commission’s ability to set a “floor” prescribing the showing that must be made before a state

¹² *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999) (emphasis in original).

¹³ *Id.* at 378.

¹⁴ 183 F.3d 393 (5th Cir. 1999) (“*Texas Public Utility Counsel*”).

¹⁵ *Id.* at 417-18.

¹⁶ *Id.* at 418. Under *Texas Public Utility Counsel*, states will remain free to adopt requirements above and beyond any minimum eligibility requirements adopted by the Commission. TDS Telecom agrees with this result. See also Recommended Decision ¶ 32.

commission can find that the statutory requirements set forth in Section 214(e)(1)-(2) of the Act have been met.

B. Minimum Eligibility Requirements Should Ensure A Rigorous ETC Designation Process That Appropriately Limits The Number Of Carriers Drawing Support From The Universal Service Fund

The Recommended Decision identifies a number of important eligibility requirements that will help to limit the payment of universal service support to “fully qualified carriers that are capable of, and committed to, providing universal service.”¹⁷ Building on the Joint Board’s recommendations, TDS Telecom supports requiring all applicants for ETC designation to demonstrate that they:

- have adequate financial resources to provide quality services throughout the designated service areas;
- are capable of and committed to providing supported service (including as the sole ETC) throughout the designated service area to all customers who make a reasonable request for service (including by building additional facilities and pledging to meet customer orders for new service within specified time periods);
- are able to remain functional in emergencies (at a level comparable to that of the wireline incumbent);
- can and will comply with relevant state consumer protection requirements applicable to the ILEC’s provision of universal service (such as rules relating to disconnection of service and responding to consumer complaints); and
- will provide local usage that is comparable to the local usage afforded by the wireline incumbent, taking into account features (including E911 service) and rates as well as the size of the local calling area.

In addition to these requirements, TDS Telecom believes that applicants for ETC designation should also be required:

- to satisfy state “carrier of last resort” obligations applicable to incumbent LECs;

¹⁷ Recommended Decision ¶ 9.

- to satisfy relevant state service quality requirements applicable to ILECs; and
- to provide subscribers with “equal access” to long distance services to the same extent that ILECs are subject to such equal access requirements.

Requiring ETCs to satisfy all of these obligations would be consistent with the Commission’s policy of competitive and technological neutrality among service providers.¹⁸ It would also promote the goal of limiting the payment of universal service support to carriers who are capable of and committed to providing an evolving level of universal service. Finally, requiring CETCs to meet these requirements would further ensure that any carrier granted ETC status could become the sole ETC in a service area if other ETC(s) chose to exit the market. This is necessary to maintain the continuity of universal service in rural areas.

C. Heightened Public Interest Requirements Should Apply To Carriers Seeking ETC Designation In Rural Service Areas

In addition to specifying mandatory eligibility requirements applicable to all applicants for ETC designation, TDS Telecom urges the Commission to provide more specific guidelines than those proposed in the Recommended Decision for state commissions applying the Section 214(e)(2) public interest test to applications for ETC designation in rural service areas. The Commission should require state regulators to conduct a fact-specific public interest analysis, at the service area (as opposed to statewide) level, weighing the costs and benefits of designating the particular petitioner as a competitive ETC in the designated service area.

The public interest analysis, whether performed by federal or state regulators, should not be driven primarily by competitive considerations. To ensure that ETC designations in rural areas are consistent with the Act, the cost-benefit analysis must focus on whether the public interest goals of the universal service program in particular will be served by designating

¹⁸ Martin Statement at 1.

the additional ETC. Thus, the regulator must analyze whether designating the additional ETC will meaningfully advance the statutory goal of promoting *universal* access to *quality telecommunications and information* services – including *advanced* services – at reasonable and *affordable rates*.¹⁹ The analysis must examine every aspect of this goal, including (1) whether the petitioner has the capability, wherewithal and intention to provide service throughout the entire service area (including as the sole ETC if the incumbent were to exit the market or relinquish its ETC status), (2) whether the petitioner's service quality commitments (including, *e.g.*, service provisioning timeframes, network availability, restoration times, and service credits) are comparable to those of the local incumbent, (3) whether the petitioner offers or will offer telecommunications and information services, including advanced services, at least comparable to those offered by the local incumbent, and (4) the rates the petitioner proposes to charge for supported services. Additional factors that should be taken into account, in light of local circumstances, include:

- Whether designating an additional ETC is economically viable given the size, access line density and amount of high-cost support received in the service area;
- Whether the ability of ETCs to serve the entire market would be undermined by the designation of multiple ETCs in the market; and
- Whether, under all the circumstances, the benefits offered by the additional provider are sufficient to justify utilizing universal service funds to support multiple networks within the particular high-cost market.

As the Commission and Joint Board have recognized, Congress in approving the designation of additional ETCs specifically recognized the potential problems with authorizing the payment of universal service support to competitive ETCs in rural service areas. It is for this

¹⁹ See 47 U.S.C. § 254(b) (setting forth universal service principles). Competition is not among the principles Congress instructed regulators to promote in developing the universal service program. Accordingly, encouraging competition can, at most, be a subsidiary goal of the universal service program.

reason that Congress required an affirmative finding that the public interest would be served before a competitive ETC could be designated in a rural service area.²⁰ It is only by conducting the type of rigorous public interest analysis described above that regulators can fulfill the statutory obligation to promote the provision of telecommunications and information services in rural areas while ensuring that the resources of the Universal Service Fund – the creation and maintenance of which imposes burdens on telecommunications users nationwide – are not squandered by supporting too many carriers in the areas drawing the largest subsidies from the Fund.

D. Rural Service Areas Should Rarely Be Subject To Redefinition, And Never Below The Wire Center Level

A rigorous public interest analysis similarly must be undertaken in considering a carrier's request to redefine a rural service area to permit the carrier to obtain ETC designation in and serve less than the entire rural study area. Consistent with the Act, which imposes the high standard of requiring both federal and state approval for any redefinition of a rural service area,²¹ the presumption must be against redefinition.

The Act requires a carrier seeking ETC status to serve the entire designated service area – this is the essential meaning of “universal service” – and defines the rural service area as the entire study area, in the absence of a finding that the public interest would be served by an alternative definition. As above, the required public interest analysis must be rigorous,

²⁰ See 47 U.S.C. § 214(e)(2); *see also* Recommended Decision, Joint Statement of Commissioners Jonathan S. Adelstein, G. Nannette Thompson, Regulatory Commission of Alaska, and Bob Rowe, Montana Public Service Commission, Approving in Part and Dissenting in Part, at 1 (Adelstein Statement) (“Establishing a meaningful public interest test and providing meaningful guidance on ETC designations will help to limit federal universal service funding to those providers who are committed to serve rural communities.”).

²¹ See 47 U.S.C. § 214(e)(5).

fact-intensive, and conducted at the service-area level. To give effect to the presumption against redefinition, the carrier seeking redefinition must be required to make a strong showing that the public interest would be *better* served by the proposed redefinition than by requiring the carrier to serve the entire rural study area.

In defining the parameters for this public interest analysis, the Commission should make clear that the mere fact that the rural ILEC has disaggregated and targeted universal service support cannot by itself support a finding that the public interest would be served by redefining the service area. Regulators still must determine whether the public interest would be served by granting the proposed redefinition and designating the petitioner as an ETC in the requested wire centers. This analysis must recognize – as the Commission has done and TDS Telecom has demonstrated in comments filed with respect to specific petitions for redefinition – that disaggregation does not always protect against the creamskimming potential created by redefining rural service areas at the wire center level.²²

In addition to mandating a rigorous public interest analysis for redefinition petitions, the Commission also should reiterate its conclusion in *Highland Cellular* that redefining rural service areas below the wire center level is never consistent with the public interest. As the Commission stated in *Highland Cellular*, a carrier seeking competitive ETC

²² See, e.g., Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37, ¶ 32 (rel. Apr. 12, 2004) (*Highland Cellular*); Comments of TDS Telecommunications Corp., *Federal-State Joint Board on Universal Service, Petition by RCC Minnesota, Inc., Pursuant to 47 C.F.R. Section 54.207(c), for Commission Agreement in Redefining the Service Areas of Rural Telephone Companies In the State of Maine*, CC Docket No. 96-45, at 6-8 (May 28, 2004); Comments of TDS Telecommunications Corp., *Federal-State Joint Board on Universal Service, ALLTEL Communications, Inc. Petition for Consent to Redefine Rural Telephone Company Service Areas in Wisconsin*, CC Docket No. 96-45, at 5-7 (May 28, 2004).

designation “must commit to provide the supported services to customers throughout a minimum geographic area.”²³ The Commission concluded that:

A rural telephone company’s wire center is an appropriate minimum geographic area for ETC designation because rural carrier wire centers typically correspond with county and/or town lines. We believe that requiring a competitive ETC to serve entire communities will make it less likely that the competitor will relinquish its ETC designation at a later date. Because consumers in rural areas tend to have fewer competitive alternatives than consumers in urban areas, such consumers are more vulnerable to carriers relinquishing ETC designation.²⁴

The Commission’s reasoning remains valid and should be affirmed in this rulemaking as a general principle applicable to all petitions seeking redefinition of rural service areas.

E. ETC Status Should Be Rescinded For Carriers That Fail To Satisfy Eligibility And Public Interest Requirements Established In This Proceeding Or That Fail To Use Universal Service Funds To Provide Supported Services

With respect to the question of the applicability of ETC eligibility requirements established in this proceeding to designations that have already been granted,²⁵ TDS Telecom urges the Commission to direct the states to rescind ETC designations (and itself to rescind designations granted by the Commission) that no longer meet applicable eligibility requirements or serve the public interest in accordance with the standards and requirements ultimately promulgated in this proceeding.²⁶

Section 214(e)(1) authorizes a carrier designated as an ETC to receive universal service payments for providing supported services only so long as the carrier continues to meet

²³ *Highland Cellular* ¶ 33; *see also* 47 U.S.C. § 214(e)(1).

²⁴ *Highland Cellular* ¶ 33.

²⁵ Notice ¶ 2; Recommended Decision ¶ 76.

²⁶ The Commission can reduce the need to reevaluate ETC designations by adopting the proposal in Part I-F below that the Commission suspend its own consideration of pending ETC petitions and encourage state commissions to do the same until an order is released in this proceeding.

the eligibility requirements for ETC status.²⁷ If a carrier no longer meets these eligibility requirements, or if the payment of universal service support to the carrier no longer serves the public interest, the carrier should no longer be eligible to receive support.²⁸ Otherwise, the Fund will be paying out support to carriers who are not entitled to such support under the Act at a time when the Commission is concerned about excessive growth of the Fund.

An annual certification requirement would provide an appropriate mechanism for periodic regulatory review (by the commission that granted ETC status) of each ETC's continuing eligibility for support. The certification requirement could take effect as early as ninety (90) days after the effective date of the order in this proceeding (which would afford carriers an opportunity to come into compliance with any new requirements). State commissions could then have the flexibility to decide whether to review all ETCs at the same time annually or to stagger the annual reviews based on the anniversary date of each carrier's designation as an ETC. The certification process should require each competitive ETC to certify – and regulators to review – (1) whether the carrier continues to meet all eligibility requirements applicable to ETCs at the time of certification; (2) whether the ETC is providing supported services throughout the designated service area in accordance with any commitments made or conditions imposed in connection with the grant of ETC designation; (3) whether the public interest continues to be served by continued designation of the carrier as an ETC, according to the public

²⁷ See 47 U.S.C. § 214(e)(1); Declaratory Ruling, *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, 15 FCC Rcd 15168, 15174 (2000) (*Section 214(e) Declaratory Ruling*) (“[W]e note that ETC designation only allows the carrier to become *eligible* for federal universal service support. Support will be provided to the carrier only upon the provision of the supported services to consumers. We note that ETC designation prior to the provision of service does not mean that a carrier will receive support without providing service.”) (emphasis in original) (internal citations omitted).

²⁸ See *Section 214(e) Declaratory Ruling*, 15 FCC Rcd at 15174 (“We also note that the state commission may revoke a carrier's ETC designation if the carrier fails to comply with the ETC eligibility criteria.”).

interest standards in effect at the time of the certification; and (4) whether the ETC has been using USF payments for the maintenance, upgrade and provision of supported services and related infrastructure.²⁹ Interested parties should have an opportunity to participate in the annual review process. Interested parties should also have the right separately to petition the applicable commission to rescind a carrier's ETC status on the ground that the carrier no longer meets the eligibility and/or public interest requirements for ETC designation.

Where a regulator concludes that a carrier is no longer eligible for ETC status, the carrier's ETC designation should be rescinded effective immediately. At most, any delay in the effectiveness of the rescission should be limited to the minimum period of time reasonably necessary for the ETC's customers to obtain service from an alternative provider, should the carrier decide to exit the market upon loss of ETC designation.

F. Federal And State Regulators Should Suspend Consideration Of Pending Petitions For ETC Designation Until After An Order Is Issued In This Proceeding

To minimize the potential disruption that could be caused by revoking ETC status in the wake of a decision adopting new ETC eligibility requirements and public interest standards in this proceeding, the Commission should (1) direct the Wireline Competition Bureau to suspend the evaluation of petitions for ETC designation while the Notice is pending and (2) issue a Public Notice calling upon state commissions similarly to suspend ETC designation proceedings while the Notice is pending. In addition to avoiding the need to revoke recent ETC

²⁹ ILEC ETCs could also be subject (and already are in many states) to an annual requirement to certify that USF payments are being used for supported services, but the certification and review process need not be as rigorous as for CETCs. ILECs recover USF payments for costs that have already been expended, and so they have already demonstrated before receiving payments that funds have been used for supported services. CETCs, on the other hand, currently recover USF payments based on the ILEC's costs rather than any showing of their own expenditures for supported services.

designations granted based on standards that become obsolete as the Commission resolves the issues raised in this proceeding,³⁰ suspending consideration of pending ETC petitions would be appropriate for the following reasons.

First, suspending additional grants of CETC designation will ensure that no additional USF support is paid to carriers that do not in fact meet the statutory eligibility and public interest requirements (as refined in this proceeding). Conversely, continuing to designate ETCs under the *Virginia Cellular* standard could result in the payment of USF support – with resulting additional strains on the Fund – to carriers who later are found to be unqualified for such support under the statute as interpreted in this rulemaking. Because these payments would have been made pursuant to a then-valid ETC designation, the payments – which turn out to have been excessive and inappropriate under the Act even though permitted at the time – probably could not be recouped by the Fund even if ETC designation were later revoked.

Second, suspending consideration of the pending petitions eliminates the incentive that carriers have – if they can satisfy existing state standards or the *Virginia Cellular* test but would have trouble meeting the guidelines proposed in the Recommended Decision – to apply for CETC designation as quickly as possible in the hopes of retaining ETC status (perhaps pursuant to a grandfathering decision³¹) even if the Commission ultimately adopts guidelines they do not meet. The Commission would significantly undermine the effectiveness of its decision in this proceeding if it were to allow carriers to pursue and retain ETC status based on

³⁰ For example, the *Virginia Cellular/Highland Cellular* public interest standard can be expected to become obsolete in at least some respects because it does not address all the issues raised in the Recommended Decision.

³¹ Recommended Decision ¶ 76. Consistent with the arguments above and in part to minimize the risks identified in this Part I-F, TDS Telecom would oppose any proposal to grandfather ETC status for carriers who no longer meet applicable eligibility and/or public interest requirements.

standards that ultimately are rejected as insufficient to preserve a sustainable Universal Service Fund.

Third, the Commission's recent attempts to develop policy concerning ETC designations through *ad hoc* adjudications have not served the public interest. Adopting an interim public interest standard in *Virginia Cellular* – instead of resolving the pending rulemaking to address the very same standard – deprived the universal service program and the rural consumers who rely on it of the benefits of notice-and-comment rulemaking in formulating well-reasoned policy decisions of general applicability. Courts and commentators alike have frowned upon agencies' using "administrative adjudication . . . [to] change[] past practices through the 'prospective pronouncement of a broad, generally applicable requirement, amount[ing] to an agency statement of general or particular applicability and future effect.'"³² Accordingly, the Commission should suspend the evaluation of pending ETC petitions under the "interim" *Virginia Cellular* standard and proceed to resolve the ETC designation issues in this rulemaking.

Finally, suspending the numerous pending petitions for ETC designation will allow the Commission to dedicate the necessary resources to resolving expeditiously the issues in this proceeding. As noted above, this rulemaking offers the preferred vehicle for addressing the important policy issues implicated in the pending petitions for ETC designation. Potentially

³² *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981), describing *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980); see also *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (noting in dicta that a notice-and-comment rulemaking is necessary when an agency's interpretation of a rule "adopt[s] a new position inconsistent with... existing regulations."); see also Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300, 308-09 (1988) ("Rulemaking yields higher-quality policy decisions than adjudication because it invites broad participation in the policymaking process by all affected entities and groups, and because it encourages the agency to focus on the broad effects of its policy rather than the often idiosyncratic adjudicative facts in a specific dispute.").

slowing the rulemaking proceeding to evaluate and decide the pending petitions will only exacerbate the problems and concerns the proceeding is intended to resolve. The longer these problems linger, the more the universal service system risks becoming inconsistent with its underlying statutory mandate.³³

II. LIMITING SUPPORT TO A SINGLE “PRIMARY LINE” WOULD BE UNWORKABLE AND INCONSISTENT WITH BOTH THE STATUTE AND THE PUBLIC INTEREST

If the Commission adopts the ETC designation requirements we have supported and proceeds on a timely basis to consider measures to ensure that all ETCs recover universal service support that is reasonably related to the carriers’ own costs of providing supported services, the viability of the Fund should be restored and there should be no need for additional measures to reduce the flow of payments from the Fund. Moreover, the alternative proposal presented by the Joint Board to control the size of the Fund – to cap per-line support and limit universal service support to a single connection – would confuse consumers, burden financially vulnerable rural carriers, harm rural service quality, and violate the Act by eroding support for local networks and slowing deployment of advanced services to rural consumers.

In evaluating the cap on per-line support and the “primary line” proposal, it is important to keep in mind the role that high-cost support plays in rural service areas. As noted in Part I above, universal service support provides an additional cost recovery mechanism for carriers providing local telecommunications services in markets in which the costs are too high to be recovered fully from subscribers without charging extremely high, potentially unaffordable, rates. Under the current system, the amounts rural ILECs recover from the Universal Service

³³ Recommended Decision ¶ 11 (noting that proposed guidelines encouraging a rigorous ETC application process are consistent with the requirements of Section 214(e)(2) and Section 254(b)(3) of the Act).

Fund are determined basically by calculating the costs of maintaining the local network, subtracting the amounts that are recovered through the payment of affordable subscriber rates, and recovering the difference from the Fund. If the mechanism for calculating rural support were altered so that current costs were divided across the number of lines served by the ILEC, the per-line support amount were frozen, and future payments were determined by multiplying the frozen per-line support amount by the number of designated “primary lines” the ILEC serves (regardless of the number of lines actually served), there is a good possibility that the ILEC would no longer recover from the Fund the full amount of support necessary to maintain the local network without increasing subscriber fees. The result would be either (or both) a decline in the scope and/or quality of local services and/or an increase in subscriber rates (probably, and most fairly, for subscribers who have chosen not to designate the ILEC as the “primary” service provider).³⁴ We evaluate the proposal against this backdrop.

A. The “Primary Line” Proposal Would Create Undue Consumer Confusion And Administrative Burdens

The Joint Board recommended that the Commission control the growth of the Fund by adopting a rule that would limit the payment of high cost support to a single connection (presumably per subscriber). However, the Joint Board conditioned its recommendation on “the Commission’s ability to develop competitively neutral rules and procedures that do not create undue administrative burdens.”³⁵ Because a thorough analysis of the primary line proposal demonstrates that this condition cannot be satisfied, the Commission should reject the primary

³⁴ Proposals to avoid this result likely would not ensure full recovery of the costs necessary to maintain local networks and could be challenged as inconsistent with the principle of competitive neutrality.

³⁵ Recommended Decision at ¶ 56.

line proposal and focus its efforts on reforming the ETC designation process as recommended above and revising the basis on which CETCs recover universal service support.

The primary line proposal described in the Recommended Decision would confuse consumers, impose costly and time-consuming administrative burdens on carriers and regulators, and significantly disrupt the prices consumers pay for telecommunications services in rural markets.

Consumer Confusion and Harm. Transitioning to a primary line limitation on USF support likely would generate significant confusion among consumers. Consumers would need to be educated about how USF payments affect the prices subscribers currently pay for telephone services, how a primary line limitation would affect those prices in the future, and what role the consumer would play in implementing the primary line limitation. Without substantial regulatory involvement, these educational efforts could be spotty and misleading if spearheaded by aggressive marketing campaigns seeking primary line designation for services that customers do not in fact use as the primary source of telecommunications service.

Consumers would be particularly vulnerable to surprise and confusion as prices for supported and non-supported services are adjusted over time to take into account changes in the way in which rural carriers are expected to recover the costs of maintaining their networks. For example, a subscriber that forgot to designate a line as “primary” could be surprised by dramatic price increases if one line were involuntarily designated as primary and other lines became ineligible for support.

Other types of consumer harm that could result from adopting a primary line proposal include:

- In a multicarrier environment, consumers could be “slammed” – either through administrative error or willful misconduct – by the involuntary conversion of an alternative line to “primary” status.
- Consumers seeking to have more than one line designated as primary (*e.g.*, for a relative living in an in-law apartment) could be forced to provide sensitive personal information about their living situation to customer service representatives or regulators.
- Consumers could be forced to give up secondary data access lines because of price increases caused by the removal of support. This problem is likely to be more severe in rural markets where alternative broadband data connections are less prevalent.³⁶

Administrative Burdens. Implementing a primary line proposal would also impose significant administrative burdens on consumers, telephone service providers, and regulators. Registering and tracking consumers’ primary line elections would be costly and complicated, and ongoing regulatory involvement would be necessary to control the inevitable potential for fraud or mismanagement. Initially, the Commission would need to make difficult decisions about how a primary line proposal would be administered and implemented, and what role regulators, carriers and consumers would play in that process. Every possible approach would create its own unique administrative burdens.

If consumers were called upon to indicate their primary line designation by a “ballot” (similar to the interexchange carrier presubscription process) or similar method, the Commission would have to decide whether the incumbent, competitive entrants, a neutral third party, or some combination thereof should administer the ballots and future elections and changes. If carriers were responsible for tracking subscribers’ designations, in a multicarrier

³⁶ Rural businesses (and economies) could suffer particular harm from a primary line proposal. Many small rural businesses require multiple lines (both voice and data) to serve their customers. If only one line received high cost support, these businesses would face higher telecommunications costs, which in the aggregate could undermine economic development in rural areas.

environment mechanisms would need to be developed through which carriers would share primary line information to ensure that each subscriber designated only one primary line. The Commission would need to address the risk that such information-sharing would run afoul of the prohibition on carriers' sharing customer proprietary network information (CPNI).³⁷

Any system requiring carriers to track and implement subscribers' primary line choices would be particularly costly for rural carriers. The carriers would have to modify their billing systems and customer support databases at significant expense to ensure the subscribers are charged in accordance with their designation of support. Additional systems personnel and customer service representatives likely would need to be hired, and existing personnel would need to be retrained on the new procedures and systems.³⁸ Rural carriers have already attempted to track primary and secondary lines for purposes of assessing different subscriber line costs (SLCs), but most carriers abandoned the effort as unworkable.

An alternative "voucher" system would introduce its own administrative complexities, including the need to develop mechanisms for distributing and authenticating the vouchers. Consumers would also need to be educated to understand why some consumers receive vouchers and others do not.

Pricing Implications. The Recommended Decision does not even mention the effect on rural ILEC cost-recovery mechanisms and pricing policies if the Commission adopted a primary line proposal that had the effect of eliminating support for some subscriber lines. As described above, a decision by the Commission to limit USF support to a single connection per subscriber likely would require rural carriers eventually to charge alternative, "unsupported"

³⁷ See 47 CFR § 64.2005(a).

³⁸ In some cases rural carriers may lack the resources to hire these additional personnel.

rates for other connections in order to adequately recover their costs. ILECs would need to be granted pricing flexibility to develop and charge these higher unsupported rates. Carriers would need to develop – and state regulators would need to review and approve – tiered tariffs setting forth alternative prices for supported and unsupported lines (even though the line and service themselves would be the same).³⁹

Although some of these pricing concerns could be alleviated through adoption of one of the Joint Board's proposed mechanisms for minimizing the impact of the primary line proposal on rural carriers, completely avoiding the problem would essentially require continued support for all rural lines, which would reduce the effectiveness of any primary line proposal in accomplishing the goal of reducing growth of the Fund. Moreover, consumers relying on the Fund for access to quality telecommunications and information services cannot afford the risks of such a dangerous regulatory experiment. In addition to the initial confusion caused by a primary line limitation, rural consumers would suffer long-term harm as the administrative and regulatory costs of the primary line limitation hamper the Fund's ability to serve consumers' changing telecommunications needs.

B. Limiting Support To A Single Connection Would Run Afoul Of The Act By Harming Rural Service Quality And Slowing Deployment Of Advanced Services To Rural Consumers

As noted above, the essential goal of the universal service program is to ensure that all consumers have access to quality telecommunications and information services, including advanced services, at affordable rates.⁴⁰ Any efforts to reform universal service to prevent excessive growth of the Fund must be consistent with this goal. In this respect the per-line cap

³⁹ Carriers might then face allegations that these tiered rates were “unjustly or unreasonably discriminatory” under the Act. *See* 47 U.S.C. § 202(a).

⁴⁰ *See* 47 U.S.C. § 254(b).

and primary line proposal recommended by the Joint Board fail because they threaten to erode the support necessary to maintain the rural networks that historically have provided and continue to provide “universal service.”

It is not the provision of individual “lines” that provides rural subscribers with access to telecommunications and information services. It is instead the maintenance of the comprehensive public switched network connecting these subscribers to each other and to the larger network serving the nation and the world that makes the provision of telecommunications and information services possible. Congress and the Commission recognized this fact in initially developing a universal service system that compensates rural carriers based on their total embedded network costs rather than the number of lines the network serves. The per-line cap and primary line proposals would undermine this system by “disaggregating” support to the access line level and eventually reducing the total support paid to rural carriers as they lost “primary” lines. Because the loss of lines would not materially diminish a rural carrier’s costs to maintain the network serving its entire service area,⁴¹ the loss of support for particular lines would ultimately harm the carrier’s ability to provide quality service to all its subscribers, thereby undermining the essential goal of the universal service program.

Uncertainty over future recovery of network costs would also reduce ILECs’ economic incentives to invest in infrastructure and new services, including rural broadband services. With broadband deployment slowed, the “information gap” – already identified as a

⁴¹ In many states LECs must maintain disconnected lines under carrier-of-last-resort obligations requiring them to stand ready to reinstate service, and must provide E911 service to otherwise “disconnected” lines. These regulations further narrow the difference between maintaining a live or lost line. For example, in California, carriers must provide access to 911 emergency services for every residential telephone connection “regardless of whether an account has been established.” 168 G.O. 15 (Cal. PUC 2004).

concern by both the President and his Democratic challenger in the 2004 election⁴² – would widen between rural consumers and their urban counterparts.⁴³ In other words, rural consumers would be deprived of advanced telecommunications and information services “reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas,” contrary to the express mandate of the Act.⁴⁴ Accordingly, the Commission must reject the primary line proposal as inconsistent with both the Act and the public interest.

CONCLUSION

TDS Telecom agrees that the Commission should take steps now to ensure the sustainability of the Universal Service Fund. Such steps must advance, rather than undermine, the overriding goals of the universal service provisions of the Act. The most effective means through which to advance the goals of the Act while controlling the growth of the Fund is to limit the payment of universal service support to *carriers* providing truly universal service throughout their designated service areas and to *amounts* that are sufficient (but not excessive) to enable the provision of such supported services. Accordingly, TDS Telecom urges the Commission (1) in this proceeding to adopt mandatory eligibility requirements and public

⁴² See, e.g., Declan McCullagh, *Bush: Broadband for the People by 2007*, CNET News, April 26, 2004, available at http://news.com.com/2100-1028_3-5200196.html?part=rss&tag=feed&subj=news (last visited Aug. 2, 2004) (describing President Bush’s desire to bring broadband to “every corner” of the U.S. to ensure “access to the information that is transforming our economy.”); John Kerry for President, *A Plan to Strengthen Rural America*, available at <http://www.johnkerry.com/issues/rural/plan.html> (last visited Aug. 2, 2004) (“[T]oday, rural communities’ access to this technology lags far behind that available in suburbs and urban areas.”).

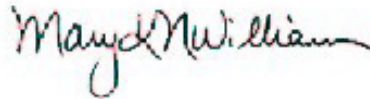
⁴³ The Act makes clear that “[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.” 47 U.S.C. 254(c)(1). By taking away the hope of future compensation for rural carriers that bring such advances to rural areas, a primary line limitation would run counter to this basic definition of “universal service.”

⁴⁴ 47 U.S.C. 254(b)(3).

interest standards that will ensure that universal support is paid only to carriers capable of and committed to advancing the universal service goals of the Act and (2) in the rural high-cost support proceeding to revise the basis upon which universal service support to CETCs is calculated to ensure that such support is reasonably related to the CETC's costs of providing supported services. The Commission should not adopt an illegal, confusing, and administratively unworkable "primary line" proposal that would erode the support necessary to maintain the local networks that provide an evolving level of universal service in rural areas.

Respectfully submitted,

TDS TELECOMMUNICATIONS CORP.

A handwritten signature in blue ink, appearing to read "Mary Newcomer Williams".

By: Gerard J. Waldron
Mary Newcomer Williams
Matthew S. DelNero
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Tel.: (202) 662-6000
Fax: (202) 662-6291

Attorneys for TDS Telecom

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